107. Mr. Rey testified that 1990 was a recession year. Advertising budgets projected for 1991 were expected to be lower than they were in 1990. Mr. Rey was very pessimistic about the economic outlook for the Orlando market. Tr. 753, 989. He "thought it [the permit] was worthless [if RBC were to be the sixth television station in the market] because there were not enough revenues to go around for a sixth station. Tr. 780-81. He testified: "I don't think anybody in their right mind would have put money into something that could not pay for itself." Tr. 781. Mr. Rey believed that if Press's station (WKCF) moved to the Bithlo tower, which is centrally located, it would permit Press's station to improve its service by providing an over-the-air signal to the three major population centers of the market (Melbourne, Daytona Beach and Orlando) as opposed to only serving two of those communities (Orlando and Daytona Beach) from Press's transmitter site at the time. Mr. Rey believed the move by Press to the Bithlo tower would make Press's station grow. Tr. 790. This would make RBC's station "worthless." Id.

108. Mr. Conant was also personally concerned about being the sixth station in the market. Rainbow Ex. 4, p. 1. Mr. Conant told Mr. Rey to "wait and see how it [the preliminary injunction motion in the Miami Tower Litigation] developed." Tr. 754.

109. By the time that the district court denied RBC's motion for preliminary injunction, Mr. Rey was more optimistic about the market. Tr. 991, 992. Mr. Rey said things had changed over the seven months before the summer of 1991. Tr. 754-55. Mr. Rey was not as pessimistic as he was during the preceding seven months. Tr. 755, 990-91. Mr. Rey told Mr. Conant that RBC was "free to go ahead" and he "thought that it was worthwhile doing it." Tr. 755.

110. Mr. Rey offered a number of explanations for his more optimistic/less pessimistic outlook by June 1991. First, there was a "big uplift" after the Gulf War. Second, there was talk about a new network emerging in the near future. But the "clincher" for Mr. Rey was learning that the Nielsen Company was going to meter the Orlando market in the very near future. Tr. 755, 797, 939, 991. According to Mr. Rey, ratings improve dramatically in a metered market. Mr. Rey first learned about the prospect of meters in the Orlando market in late May-early June 1991. Tr. 756. For Mr. Rey, this was the "light at the end of the tunnel." Tr. 797. (Nielsen eventually metered the Orlando market in late 1992 or early 1993. Tr. 992.) Despite this new found optimism in mid-1991, however, RBC did not resume its construction efforts until the summer of 1993, two years later. Tr. 741-42, 909.

111. Mr. Conant corroborated Mr. Rey's testimony about Mr. Rey's pessimism in late 1990 through mid-1991. Mr. Conant testified as follows: Mr. Rey went to Howard Conant's office in Chicago in late 1990 to discuss RBC's progress. Mr. Rey told Mr. Conant at that time that the project had, in his opinion, become riskier because of the dispute with Gannett over the tower space. The Miami Tower Litigation was one of the factors that led Mr. Rey to worry about the future of RBC's station. Mr. Rey was worried about the possibility that there would be an additional television signal, a sixth television station -- Press's station WKCF -- in the Orlando market. Mr. Conant was also concerned about an additional station in the market. Mr. Rey also referred to the national economic downturn. Conant was concerned about the problems raised by Mr. Rey and particularly about the prospect of another market television station. Mr. Conant told Mr. Rey that he (Conant)

would take a "wait and see attitude" and that Mr. Rey should as well. Mr. Conant testified that Mr. Rey was "somewhat hesitant" to proceed with construction of the station in late 1990. RBC Ex. 4, p. 1. Tr. 682-83, 685-691.

112. Messrs. Rey and Conant next spoke about the television station in the summer of 1991, after the District Court had denied RBC's motion for a preliminary injunction. Mr. Rey indicated to Mr. Conant that conditions in the Orlando television market had improved both economically and because the market was to be metered by the Nielsen Company. Conant was of the opinion that this was an extremely important advantage for a new independent television station. RBC Ex. 4, p.1. Tr. 675. Nevertheless, RBC waited for almost two years (until the summer of 1993) to resume construction of the station. Tr. 741-42, 909.

113. RBC, which had the burdens of proceeding and proof under Issue 4, did not offer any evidence pursuant to the issue to support a waiver of Section 73.3598(a) of the Commission's Rules.

CONCLUSIONS OF LAW

Issue 1 -- *Ex Parte* Issue

114. Issue 1 seeks "To determine whether [RBC] intentionally violated Sections 1.1208 and 1.1210 of the Commission's *ex parte* rules by soliciting a third party to call the Commission on [RBC's] behalf, and by meeting with Commission staff to discuss the merits of [RBC's] application proceedings."

115. The issue was designated upon remand from the Court of Appeals which found, on the record before it, that RBC "could not reasonably have believed the proceeding

to be unrestricted because the FCC had repeatedly informed [RBC's] counsel that it considered the matter to be restricted within the meaning of the *ex parte* rules. *Press*, 59 F.3d at 1370-71. The Court of Appeals relied on the evidence before it that Ms. Polivy was sent a copy of the Daniels letter that declared the proceeding to be restricted on the basis of Press' January 1991 Petition for Reconsideration (the same basis upon which the Commission ultimately held the proceedings restricted), and the evidence that Mr. Gordon had on a number of occasions told Ms. Polivy directly that the proceeding was restricted when she attempted to discuss the merits. *Id.*

116. On remand for "further proceedings consistent with this opinion" (59 F.3d at 1373), the Commission did not merely decide that RBC should be disqualified as a result of the finding that RBC's representatives had no reasonable basis for the view that the *ex parte* rules did not apply; rather it set the issue for hearing on whether the contacts, already found have no reasonable basis, were "intentional" violations by RBC. Thus, though the Presiding Judge is bound in the Commission's findings that conclusion that RBC has violated the *ex parte* rules (Jt. Ex. 10, p. 7-8), the Presiding Judge must nevertheless determine whether there is any evidence that RBC "intentionally" violated the *ex parte* rules (*HDO*, Issue No. 1).

117. The HDO issue can be broken down into three main inquiries: (1) what evidence is there that RBC's representatives acted intentionally in violating the *ex parte* rules; (2) did RBC, the applicant, know or should be held to have known, that the actions of its counsel were violations of the *ex parte* rules; and (3) assuming that RBC itself had no direct intent to violate the *ex parte* rules, to what extent should it be disqualified for the intentional

acts of its counsel.

118. On the first question, -- the intent of RBC representatives -- there are a number of factual disputes that must be resolved as a threshold matter.

119. With respect to the conflicting testimony of Ms. Polivy and Mr. Gordon as to whether he informed her that the proceeding was restricted, and cut her off when she attempted to ague the merits, Mr. Gordon's testimony is clearly more credible than Ms. Polivy's and should be accepted as an accurate statement of the facts. Ms. Polivy's categorical denial that there was any attempt to argue the merits of the application to Mr. Gordon is not credible, for the reasons set forth below.

120. The evidence shows that several of the telephone calls between Ms. Polivy and Mr. Gordon occurred after the March 22, 1993 letter from the VSD stating that at that juncture the staff "cannot conclude that grant of the [RBC] extension application would serve the public interest." Thus, contrary to Ms. Polivy's statement that her only reason for calling Mr. Gordon was to inquire as to when she could expect a decision on the pending applications, Ms. Polivy had specific reasons after March 22, 1993 to raise the merits with Mr. Gordon in an effort to convince him that the staff should find that granting RBC's applications were in the public interest. Moreover, given her admission to the Presiding Judge that she engaged in "aggressive" status calls about the delay in obtaining a decision , it is not credible that she would not also seek to address the merits of the applications. As the Presiding Judge aptly noted , Ms. Polivy's claim that she believed the proceeding was not restricted as to RBC, makes it ***more likely*** that she would indeed seek to press her views on the merits in her "aggressive" status calls about the pending matter, particularly after the

March 22, 1993 letter requesting a response by RBC as to why granting its applications would still be in the public interest. In view of the fact that Ms. Polivy was "upset" and "irate" at the ultimate VSD decision in June, there is no reason to believe that she would have been any less upset or irate after reading the March 22, 1993 letter. Thus, it is likely that Ms. Polivy did indeed seek to discuss the merits with Mr. Gordon, and was told at that time that the proceeding was restricted.

121. Beyond the inherent incredibility of her testimony, Ms. Polivy, as the outside counsel for RBC and a major actor in the *ex parte* episode, has a significant stake in the outcome of the proceeding, where as Mr. Gordon has no apparent reason to misstate the facts in a way to disfavor Ms. Polivy or RBC. Ms. Policy could offer no coherent reason why Mr. Gordon would misrepresent the facts -- suggesting only that somehow he is motivated by "animus." But the Presiding Judge has had ample opportunity to observe Mr. Gordon's testimony, and can readily conclude that he has not testified out of animus or fantasy, but has rendered an honest account of the facts as he recalls them.

122. There is also a factual question as to whether Ms. Bush's phone call to Mr. Stewart was intended by Ms. Polivy to be a merits conversation, and whether it in fact addressed the merits of RBC's position. RBC has conceded in this hearing that there was a discussion on the merits of the RBC applications at the July 1, 1993 meeting with the Bureau staff.

123. Although Ms. Bush and Ms. Polivy have tried to characterize Ms. Bush's call as merely a "status call," the testimony adduced at the hearing confirms that Ms. Polivy intended Ms. Bush to discuss the merits in her call to the FCC staff, and that she in fact did

discuss the merits. At the time of Ms. Bush's call to Mr. Stewart, there was no pending matter, and thus no legitimate reason for a simple "status" call.

124. There is also strong evidence suggesting that Ms. Polivy intended Ms. Bush to address the merits in her telephone call to Mr. Stewart. Ms. Polivy was noticeably "upset" with the VSD decision, and testified that she wanted Ms. Bush to "find out what was going on over there" because in her judgment, the Commission had "certainly done something that was different from anything they had ever done." Such an inquiry necessarily involves the merits of the matter.

125. Ms. Polivy recognized that by selecting Ms. Bush to make the contact with the Bureau, she could expect that any petition for reconsideration she later filed would be taken "seriously."

126. Ms. Bush does not deny the accuracy of Mr. Stewart's statement that Ms. Bush asked him whether the cancellation of RBC's construction permit was consistent with the FCC minority ownership policy -- a matter that the Commission and the Court of Appeals have found to be an inquiry on the merits.

127. Thus it is concluded that Ms. Polivy intended to, and did, attempt to discuss the merits with Mr. Gordon after March 22, 1993, and that Ms. Polivy and Ms. Bush intended that Ms. Bush would raise the merits of the applications in her telephone call to Mr. Stewart.

128. The question of whether these intentional discussions of the merits contacts knowing violations of the *ex parte* rules is more difficult to resolve factually. Both Ms. Polivy and Ms. Bush were knowledgeable practitioners before the FCC.

129. Ms. Bush appears to have relied entirely on Ms. Polivy to tell her whether the matter was in litigation. Although she might have reviewed the files herself if she had ready access to them, at the time she made her calls, she was on maternity leave in New York. In these circumstances, it was not unreasonable for Ms. Bush to rely on Ms. Polivy for the relevant information that would have permitted a determination whether the proceedings were restricted under the *ex parte* rules. The record shows that Ms. Polivy did not tell Ms. Bush that the matter was restricted, nor did she tell Ms. Bush about Press' Petition for Reconsideration, or the Daniels letter.

130. There is also a factual dispute in the record over whether Ms. Polivy had any discussion with Mr. Pendarvis and/or Mr. Stewart about whether any formal objections had been filed in the proceeding. Neither Mr. Stewart nor Mr Pendarvis recalls any such conversation with Ms. Polivy -- they state categorically that she never said anything about the applicability of the *ex parte* rules to the RBC proceeding. Ms. Polivy states that she did tell Mr. Pendarvis and/or Mr. Stewart that informal objections had been filed (and she mentioned in her testimony in this proceeding that she stated that Press had filed a petition to reconsider a late filed informal objection), at which point Mr. Pendarvis and/or Mr. Stewart stated, words to the effect, "then we can meet." As between Ms. Polivy and Mr. Pendarvis/Mr. Stewart, the testimony of the FCC staff should be credited over that of Ms. Polivy. The staff has no direct stake in the outcome of this proceeding, the issue being solely the actions of RBC and its agents, not the staff.[11] Moreover, the staff's testimony that

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[11] As the Commission recognized in a further order, permitting the deposition of certain members of the FCC staff with relevant knowledge of the *ex parte* contacts, the designated issue focuses on "Rainbow's understanding of the applicability of the *ex parte*

there was not discussion at all of the applicability of the *ex parte* rules leaves the staff in the position of accepting a meeting without even asking about the restricted status of the matter (something that makes the staff look less conscientious), whereas if the staff would have been able to avoid criticism if they accepted Ms. Polivy's version and asserted that the asked Ms. Polivy, but she mislead them on the true facts by failing to mention in sufficient detail the Petition for Reconsideration. The fact that the staff asserts that there was no discussion at all, therefore, is a more credible testimony than the self-serving testimony of Ms. Polivy.

131. With respect to Ms. Polivy, her personal view of the applicability of the *ex parte* rules was tied up with her disagreement over whether a Petition for Reconsideration of an Informal Objection can create a restricted proceeding when the original Informal Objection did not create a restricted proceeding. Ms. Polivy also testified that she did not consider the Daniels letter as addressing any restriction on RBC because the Note to Section 1.1204 appeared to restrict third party informal contacts but not oral contacts by the formal party. That reading of the Daniels letter is utterly unfounded, and it is not credible that Ms. Polivy could come to that conclusion from a fair reading of the text of the Daniels letter. But the Daniels letter does depend in the end on the sole determination that Press' Petition for Reconsideration triggered the application of the *ex parte* rules under Section 1.1208.

132. Significantly, the Commission nevertheless recognized that Ms. Polivy's contrary position had "potential merit." 9 FCC Rcd. at 2844 ¶ 30. Further the Commission found that the applicability of its rules was "clouded" by the fact that Press had requested

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rules to this proceeding." *Rainbow Broadcasting Co.*, FCC-96-213, rel. May 13, 1996 at 3 ¶ 11.

reconsideration "for all of the reasons set forth in its [Informal] Objection, which it incorporated by reference in its petition for reconsideration. *Id.* at 2844 n. 22. The Commission found that "we understand why, in the absence of a clear ruling on this point, [RBC] may have concluded that the petition for reconsideration had no more effect on the character of the proceeding than did the informal objection Press asked the Commission to reconsider." *Id.* at 2844-45 ¶ 30. Based on the foregoing, the Commission concluded that RBC appeared to have a "sincere" and "reasonably believed" that the proceeding was not restricted. *Id.* at 2845 ¶ 34. Although the Commission found that RBC should have been sufficiently alerted to the issue of possible application of the rule as to have raised the issue before discussing the merits with the bureau staff, the Commission nevertheless indicated that it recognized that it was breaking new ground by concluding and so issued a warning to the bar for the future (*id.* at 2846 ¶ 35):

> It should now be clear to counsel, parties, and their authorized agents that they have to inform relevant decision-makers as to the *ex parte* status of a proceeding where there are any questions or ambiguities in this connection and that they have a duty to raise potential *ex parte* issues if they are unsure as to the status of the proceeding.

133. The Court of Appeals apparently rejected the conclusions that RBC could reasonably have believed that the proceeding was not restricted, based largely on its finding that in addition to the Daniels letter, Ms. Polivy had also been directly told by Paul Gordon on several occasions that in 1993 that the proceeding was restricted as to RBC. 59 F.3d at 1368. But, having credited Mr. Gordon as presenting an accurate, unbiased, portrayal of the facts, it is clear that his statements in the record in this case also provide further evidence of Ms. Polivy's sincerity in holding her position that the matter was not restricted.

134. The Court of Appeals was particularly concerned that Ms. Polivy proceeded to ignore Mr. Gordon's statements and the Daniels letter (59 F.3d 1571):

> Even assuming the uncertainty of FCC precedent, however, the Commission's repeated notice to Polivy that it considered the proceedings restricted should have cautioned [RBC] about any belief to the contrary.

Ms. Polivy certainly acted in haste, and anger, in arranging for the *ex parte* contacts. But the Commission's recognized that the case involved more than merely ambiguity in the rules on when a proceeding becomes restricted; the Commission also recognized that there the precedent did not clearly command a party or its representative to inform relevant decision-makers about any questions as to whether the proceeding is restricted. The Commission "admonished" Ms. Polivy for her negligent failure to comply with the *ex parte* rules and used the RBC case as a warning to others in the bar that "[i]t should now be clear" that such conduct in unacceptable. 9 FCC Rcd. at 2846 ¶ 34. But, the Commission was not willing to use Ms. Polivy's conduct to disqualify RBC. *Id.*

135. Finally, there is the question raised directly by the *HDO* -- did the applicant intentionally violate the *ex parte* rules. There is no evidence that RBC formed an independent judgment on the applicability of the *ex parte* rules. RBC has stated on the record that it relied solely on counsel in determining its compliance with the *ex parte* rules, and it waived its attorney-client privilege to put Ms. Polivy and Ms. Bush on the stand in its defense.

136. Moreover, Ms. Polivy testified that she did not send to RBC a copy of the Daniels letter and did not discuss the Daniels letter with RBC's principals. While Ms. Polivy may not have used good judgment in that course of action, it goes far to absolve RBC

of any direct knowledge of the Daniels letter. There is also no evidence in the record one way or the other as to whether RBC principals were aware of Mr. Gordon's statements to Ms. Polivy about the restricted status of the proceeding.

137. Mr. Rey, one of the principals of RBC, did attend the July 1, 1996 meeting with the Bureau staff and with Ms. Polivy. The fact that he was in attendance -- to provide information about what RBC had done during is construction period -- does not mean that he knowingly and intentionally violated the *ex parte* rules when he was accompanied by his lawyer to whom he looked for guidance on FCC matters. There is no evidence that Mr. Rey or any other principal of RBC took any individual independent action that constituted an *ex parte* contact.

138. In these circumstances, where the are grounds (reasonable or not) for Ms. Polivy to question whether the *ex parte* rules apply, and where RBC did not in itself have any independent information regarding the status of the proceeding, it would be unjust to apply to RBC the ultimate sanction of disqualification because of *ex parte* violations.

139. In prior cases, where there was no question regarding the applicability of the *ex parte* rules, the FCC has refrained from employing the ultimate penalty of disqualification of the applicant where the violation has been "isolated." Thus, in *Pepper Schultz*, 4 FCC Rcd. 6393, 6403 (Rev. Bd. 1989), the matter was clearly restricted, and the applicant had a Senator send a letter to the Administrative Law Judge raising the merits of the matter in litigation. The Review Board found that the violation was intentional, and that the principal knew inherently that it was wrong to try to influence a judge in an ongoing proceeding, but the Review Board found that the solicitation was an isolated event. Considering the

Commission's past precedent regarding isolated indents, the Review Board concluded that such violations did not carry the sanction of disqualification, but rather a stern warning against any such future violations. *Accord Centel Corp.*, 8 FCC Rcd. 6162, 6164 (1993), *pet. for rev. dismissed sub nom. American Message Centers v. FCC*, No. 93-1550 (D.C. Cir. 1994).

140. The circumstances here, even more than in *Pepper Schultz* and the cases cited therein, mitigate against disqualification based on the *ex parte* violations. Unlike other cases, there was a basic question of whether the *ex parte* rules even applied; the applicant itself was not directly involved in the *ex parte* contacts (except on a tangential basis) and did not appear to solicit those contacts; the particular *ex parte* contacts were isolated events in a multi-year Commission proceeding.[12]

141. In conclusion, the balance struck by the Commission in its 1994 decision was correct, and the current factual record supports reinstituting that decision with respect to the *ex parte* issue.

Issues 2 and 3 -- Financial Misrepresentation Issue and Tower Litigation Misrepresentation Issue

The Legal Framework

142. Section 1.17 of the rules ("Truthful written statements and responses to Commission inquiries and correspondence") provides:

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[12] The fact that applicant has engaged conduct reflecting either active misrepresentation to the Commission or lack of candor (Issues 2 and 3, *infra*), might militate towards finding a disqualifying violation on the *ex parte* conduct as well. CITES. However, in the circumstances here, where the other disqualifying violations are so strong and the *ex parte* violations are relatively much weaker, it is recommended that a disqualification decision rest on only the strongest sections of the case.

> The Commission or its representatives may, in writing, require from any applicant, permittee or licensee written statements of fact relevant to a determination whether an application should be granted or denied, or to a determination whether a license should be revoked, or to some other matter within the jurisdiction of the Commission. No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.
>
> Note: Section 1.17 is limited in application to written matter. It implies no change in the Commission's existing policies respecting the obligation of applicants, permittees and licensees in all instances to respond truthfully to requests for information deemed necessary to the proper execution of the Commission's functions.

143. Section 73.1015 of the rules ("Truthful written statements and responses to Commission inquiries and correspondence") provides:

> The Commission or its representatives may, in writing, require from any applicant, permittee, or licensee written statements of fact relevant to a determination whether an application should be granted or denied, or to a determination whether a license should be revoked, or to any other matter within the jurisdiction of the Commission, or, in the case of a proceeding to amend the FM or Television Table of Allotments, require from any person filing an expression of interest, written statements of fact relevant to that allotment proceeding. No applicant, permittee, licensee, or person who files an expression of interest shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.
>
> Note: Section 73.1015 is limited in application to written matter. It implies no change in the Commissions existing policies respecting the obligation of applicants, permittees and licensees in all instances to respond truthfully to requests for information deemed necessary to the proper execution of the

Commission's functions.

144. The Commission generally views "misrepresentation and lack of candor in an applicant's dealings with the Commission as serious breaches of trust." *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1211 (1986) ("*Character Policy Statement*"). The Commission defines misrepresentation as "an intentional misrepresentation of fact intended to deceive." *Silver Star Communications-Albany, Inc.*, 3 FCC Rcd 6342, 6349 (Rev. Bd. 1988). Lack of candor, on the other hand, exists when an applicant breaches its duty "to be fully forthcoming as to all facts and information relevant to a matter before the FCC, whether or not such information is particularly elicited." *Id.*; *see also Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983) (*Fox River*).

145. It is well established that an intent to deceive is the *sina qua non* of a misrepresentation issue. *Trinity Broadcasting of Florida, Inc.*, 10 FCC Rcd 12020, 12063 (1995); *Armand Garcia*, 3 FCC Rcd 1065, 1067 (Rev. Bd.), *review denied*, 3 FCC Rcd 4767 (1988).[13] While misrepresentations involve false statements of fact made with an intent to deceive, lack of candor involves concealment, evasion and other failure to be fully forthcoming. Both represent deceit, differing only in form. *Fox River*, 93 FCC 2d at 129. Absolute candor is perhaps the foremost prerequisite for FCC licenseeship. *Catoctin Broadcasting Corp. of New York*, 2 FCC Rcd 2126 (Rev. Bd. 1987), *aff'd*, 4 FCC Rcd 2553 (1989), *recon. denied*, 4 FCC Rcd 6312, *aff'd*, 920 F.2d 1039 (D.C. Cir. 1990) (table);

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[13] Fraudulent intent can be found from "'the fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity.'" *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1260 (D.C. Cir. 1991), quoting *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980). In other words, "intent can also be found from motive." *Joseph Bahr*, 10 FCC Rcd 32, 33 (Rev. Bd. 1994).

Mid-Ohio Communications, Inc., 104 FCC 2d 572 (Rev. Bd. 1986), *review denied*, 5 FCC Rcd 940 (1990), *aff'd*, 946 F.2d 1565 (D.C. Cir.) (table), *cert. denied*, 502 U.S. 956 (1991). Indeed, "the Commission's demand for absolute candor is itself all but absolute." *Kate F. Thomas*, 8 FCC Rcd 7630, 7632 (Rev. Bd. 1993), *citing Emision de Radio Balmaseda, Inc.*, 7 FCC Rcd 3852, 3858 (Rev. Bd. 1992), *review denied*, 8 FCC Rcd 4335 (1993), *citing Richardson Broadcasting Group*, 7 FCC Rcd 1583 (1992), *aff'd sub nom. Younts v. FCC*, 995 F.2d 306 (D.C. Cir. 1993) (table).

Conclusions as to Issue 2 -- Financial Misrepresentation Issue

146. Issue 2 seeks "To determine whether [RBC] made misrepresentations of fact or was lacking in candor with respect to its financial qualifications regarding its ability to construct and initially operate its station in violation of Sections 1.17 and 73.1015 of the Commission's rules or otherwise."

147. It is concluded that RBC made knowingly and intentionally misrepresentations, or at a minimum was lacking in candor, in its statements to the Commission regarding its financial qualification when it filed its fifth extension application on January 25, 1991. In the its fifth extension application, RBC affirmatively represented to the Commission that its prior certification of financial qualification was still applicable. RBC also lacked candor in its filing in the fifth extension application by knowingly failing to advise the Commission that a substantial condition had been placed on its ability to obtain financing.

148. At the time it filed its fifth extension application RBC was relying exclusively on an oral agreement to finance the station; it did not have a promissory note or an actual loan from Mr. Conant. In those circumstances, RBC must demonstrate that it actually has in

hand a loan commitment in the form of a present "firm" intention to make a loan. *Merrimack Valley Broadcasting, Inc.*, 82 F.C.C.2d 166, 167 (1980). See *Liberty Productions Limited Partnership*, 7 FCC Rcd 7581, 7584 ¶ 23 (1992), *recon. dismissed*, 8 FCC Rcd 4264 (1993); *Scioto Broadcasters Limited Partnership*, 5 FCC Rcd 5158, 5160 ¶ 12 (Rev.Bd.1990), *rev. denied*, 6 FCC Rcd 1893 (1991), *aff'd mem. sub nom. Mid-Ohio Radio, Ltd. v. FCC*, 990 F.2d 1377 (D.C.Cir.1993).

149. The facts of this case offer an unusual window into Mr. Rey's mind precisely at the time he filed RBC's fifth extension application. Only two weeks before filing that extension application, Mr. Rey gave sworn testimony in the Miami Tower Litigation that Mr. Conant had told him that if Press is able to enter the market as the fifth operating station, Mr. Conant would probably not finance the station. In Mr. Rey's opinion -- at the very time he was filing the fifth extension application -- RBC's the construction permit was "worthless" unless RBC successfully kept Press off the tower because RBC would not be economically viable competing as the sixth station in Orlando.

150. Thus, regardless of whether or not Mr. Conant's loan commitment was sufficiently "firm" prior to the January 25, 1991 filing of the fifth extension application, at the time RBC made that filing, Mr. Conant's loan commitment contained a substantial contingency -- that RBC succeed in keeping Press from entering the Orlando market. Yet, at the time of the filing of the fifth extension application on January 25, 1991, RBC had no way of knowing whether or not it would be successful in the Miami Tower litigation in keeping Press out of the Orlando market.

151. Thus, RBC affirmatively misrepresented the facts, or was at a minimum

lacking in candor, when it stated in its fifth extension application that the representations contained in the original application for construction permit were still true and correct. Further, RBC affirmatively misrepresented the facts, or was lacking in candor, when it stated in an attachment to the January 25, 1991 filing that RBC was ready, willing and ready to proceed with construction of the station upon a ruling from the District Court in the Miami Tower litigation. While RBC may have been ready to construct upon a ***successful*** resolution of the Miami Tower Litigation, it certainly was not ready willing and able to move forward with construction if the Miami court had ruled ***against*** RBC in January or February of 1991.[14]

152. The attempts by Mr. Conant to claim that he was always ready to lend money to RBC, regardless of the outcome of the Miami Tower Litigation, are belied by his own prior sworn testimony. As the Presiding Judge observed first hand, Mr. Conant's written statement simply cannot be squared with his oral testimony that he never withdrew or qualified his loan commitment to RBC. In his oral testimony, Mr. Conant claimed that only Mr. Rey was "concerned" about the possibility of another station in the market, and that he (Mr. Conant) did not believe it would be a serious obstacle; he only was reflecting the concern of Mr. Rey. Yet in his written statement, Mr. Conant specifically stated: "I was concerned about the problems that he raised and particularly about the prospect of another

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[14] By the time the district court denied the preliminary injunction in June 1991, RBC thought that the economic conditions in the Orlando market had improve and he was encouraged by the prospect of Neilsen meters in the market. However, the fact that the economic conditions had changed by that time, and therefore the denial of injunctive relief was not as devastating as Mr. Rey had feared it would be a few months earlier, does not change the fundamental fact that when it filed its fifth extension application, RBC did not believe that its could obtain financing if it lost the Miami Tower Litigation.

market television station" -- in direct contraction to his oral statement.

153. Similarly, Mr. Conant utterly failed in his attempt to reconcile his statement that he was going to take a wait and see attitude regarding the loan. In his oral testimony, Mr. Conant sought to avoid the plain meaning of those words by claiming that he was simply stating that he wanted to wait until RBC had clear authority to construct its station. But, as RBC's counsel stipulated at the hearing, RBC had the requisite clear authority to construct the station in August 1990. When faced with that fact, Mr. Conant had no answer at all as to why he could not then provide a loan for the construction of the station.

154. Since the focus of this proceeding is on what RBC believed at the time it filed it fifth extension request in January 1991, it is entirely irrelevant that Mr. Conant later reaffirmed his financial commitment after RBC lost its motion for preliminary injunction the District Court in June 1991. Nor is it relevant to the financial misrepresentation issue that RBC eventually found other financing and built and now operates its station. All that is important is what RBC actually believed in January 1991 when it filed its fifth extension request. On the specific issue set for hearing by the Commission, RBC has clearly committed an intentional misrepresentation, or laked at a minimum, candor, in filing its fifth extension application.

Conclusions as to Issue 3 - Tower Litigation Misrepresentation Issue

155. Issue 3 seeks to determine whether RBC made misrepresentations or was lacking in candor regarding the nature of the tower litigation in terms of its failure to construct in connection with its fifth and sixth extension applications, in violation of Sections 1.17 and 73.1015 of the Commission's Rules or otherwise.

156. It is concluded that the statement by RBC in the fifth and sixth extension applications -- that "[a]ctual construction has been delayed by a dispute with the tower owner" -- was misleading, inaccurate and, at a minimum, lacking in candor for two independent reasons. First, RBC had initiated the tower litigation to prevent Press, its competitor, from getting on the Bithlo tower. Second, RBC was in no way precluded or "delayed" from beginning construction by its pendency.

157. The "dispute" with the tower owner cited in the fifth and sixth extension applications could not accurately be said to have "delayed" construction in any meaningful way. The "dispute" was ***not*** a bar to ***RBC's*** construction. To the contrary, it was a lawsuit initiated by RBC and designed to prevent RBC's tower owner from leasing certain tower space to its competitor, Press. Far from relying on some notion that the tower owner was preventing RBC from constructing, RBC's allegations in the civil suit demonstrated that there was absolutely no impediment to RBC's construction whatsoever. Approximately one month before RBC told the Commission that construction had been "delayed" because of a "dispute" with RBC's tower owner, Mr. Rey testified under oath in December 1990 in the Miami Tower Litigation that he recognized that RBC could construct at any time if it so chose.

158. Although Mr. Rey attempted to retract this testimony at the 1996 hearing, his hearing testimony cannot be credited. Mr. Rey testified that he believed RBC could not construct the station during the pendency of RBC's motion for a preliminary injunction because of an order by Judge Marcus directing the parties to maintain the status quo. However, this testimony is belied by Mr. Rey's deposition testimony in the Miami Tower Litigation and by documentary evidence in the record, namely, the transcript of the

prehearing conference and the judge's order itself. In addition, Howard Conant, an RBC witness, testified that Mr. Rey never told him that "the tower litigation legally prevented [RBC] from going forward" with construction. In any event, Mr. Rey admitted that RBC did not make this claim to the Commission in any of the pleadings it filed in the proceeding, thus diminishing significantly the credibility of Mr. Rey's revisionist testimony at the hearing. Moreover, there is no documentary or testimonial evidence to corroborate Mr. Rey's testimony. To the contrary the only credible evidence on this matter (Press Ex 16 & RBC Ex. 5) shows that Gannett and the other defendants in the Miami Tower Litigation were prohibited from going forward with construction of Press's place on the tower, but they were not prohibited from going forward with construction of RBC's space on the tower. In any case, even if there were such an injunction, Mr. Rey admitted that RBC could have removed it simply by voluntarily dismissing its lawsuit and going forward with construction.

159. At the same time RBC was representing to the Commission that "actual construction ha[d] been delayed by a dispute with the tower owner," RBC was also repeatedly representing to the Commission that it was "ready, willing and able" to construct." But in its response to the Video Service Division's letter in April 1993, RBC flatly contradicted that statement, saying instead that RBC is unable to construct because of the delay in processing its *pro forma* assignment application.

160. It is well established that the traits of honesty and forthrightness are of paramount concern to the Commission. The trait of truthfulness is a key element of character necessary to operate a broadcast station in the public interest. In *Character Policy Statement*, 102 FCC 2d at 1211, the Commission stated:

> We believe it necessary and appropriate to continue to view misrepresentation and lack of candor in an applicant's dealings with the Commission as serious breaches of trust. The integrity of the Commission processes cannot be maintained without honest dealings with the Commission by licensees.

161. It is concluded that RBC's lack of candor regarding the nature of the tower litigation is a ground for RBC's disqualification. RBC engaged in deliberate lack of candor, if not outright misrepresentation, in the two extension applications filed with the Commission. "Intent is a factual question that can be inferred if other evidence shows that a motive or logical desire to deceive exists . . . ." *Black Television Workshop of Los Angeles, Inc.*, 8 FCC Rcd 4192, 4198 n. 41 *recon. denied*, 8 FCC Rcd 8719 (1993), *further recon. dismissed*, FCC 94I-013, released February 15, 1994, *review denied*, 9 FCC Rcd 4477 (1994), *aff'd sub nom. Woodfork v. FCC*, 70 F.3d 639 (D.C. Cir. 1995) (table), *cert. denied*, 116 S.Ct. 2548 (1996), *rehearing denied*, 1996 WL 487957 (Aug. 27, 1996). "[W]here the factual question at issue is the intent of a party, . . . proof of the disputed fact may turn on inferences to be drawn from other facts." *California Public Broadcasting Forum v. FCC*, 752 F.2d 670, 679 (D.C. Cir. 1985). It is concluded that such inferences may properly be drawn against RBC in this case.

162. RBC plainly had a motive to deceive the Commission into believing that the Miami Tower Litigation, a/k/a the "dispute with the tower owner," precluded it from constructing. *Cf. Press*, 59 F.3d at 1371. Under Section 73.3534, an extension of a construction permit will be granted only if the permittee has (a) completed construction, or (b) made "substantial progress" in its construction, or (c) been prevented from making progress for reasons "clearly beyond the control of the permittee. . . ." RBC could not

satisfy either of the first two criteria; therefore, it had to persuade the Commission that factors beyond its control had prevented it from proceeding with construction. Thus, it is concluded that RBC had a clear motive when it represented to the Commission that construction had been delayed by the Miami Tower Litigation.

163. The lack of candor that RBC perpetrated upon the Commission in the fifth and sixth extension applications demonstrate a pattern of misconduct suggesting an unwillingness or inability on the part of RBC to meet the basic responsibilities of a Commission licensee. Accordingly, it is concluded that this issue should be resolved against RBC.

Issue 4 - Section 73.3534/73.3598 Issue

164. Issue 4 seeks "to determine whether [RBC] has demonstrated that under the circumstances either grant of a waiver of Section 73.3598(a) or grant of an extension under Section 73.3534(b) is justified."

165. Section 73.3598 ("Period of construction") provides:

> (a) TV broadcast stations. Each original construction permit for the construction of a new TV broadcast station, or to make changes in an existing station, shall specify a period of no more than 24 months from the date of issuance of the original construction permit within which construction shall be completed and application for license filed.

166. Section 73.3534(b) of the Commission Rules sets forth the conditions under which a construction permit can be extended. Section 73.3534(b) ("Application for extension of construction permit or for construction permit to replace expired construction permit") provides as follows:

> (b) Applications for extension of time to construct broadcast stations, with the exception of International Broadcast and Instructional TV Fixed stations, will be granted only if one of

> the following three circumstances have occurred:
>
> (1) Construction is complete and testing is underway looking toward prompt filing of a license application;
>
> (2) Substantial progress has been made i.e., demonstration that equipment is on order or on hand, site acquired, site cleared and construction proceeding toward completion; or
>
> (3) No progress has been made for reasons clearly beyond the control of the permittee (such as delays caused by governmental budgetary processes and zoning problems) but the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction.

See Community Service Telecasters, Inc., 6 FCC Rcd 6026 (1991) (extension of time within which to construct denied); *Panavideo Broadcasting, Inc.*, 6 FCC Rcd 5259 (1991) (same); *Golden Eagle Communications, Inc.*, 6 FCC Rcd 5127 (1991) (*Golden Eagle*1) (same); *High Point Community Television, Inc.*, 2 FCC Rcd 2506 (1987) ("*High Point*") (same); *Metrovision, Inc.*, 3 FCC Rcd 598 (Video Services Division 1988) (same). The Commission held in *Golden Eagle* that:

> [t]he ***only*** bases for grant of an extension where construction has not been completed or testing is not underway are substantial and sustained progress ***or*** circumstances beyond the permittee's control that prevented the construction.

6 FCC Rcd at 5129 (emphasis added).

167. The Commission clearly expects construction efforts to be diligent and on-going, and a permittee is not allowed to begin some preliminary construction-related projects early in the process and then to simply sit back and obtain extensions *ad infinitum* on the basis of those initial efforts. *Id.* In the words of the Commission (*id.*):

> a permittee's extension application will be judged according to the progress made during the most recent construction period.

> If this were not so, a permittee would partially construct a station and then obtain extensions indefinitely, based on that initial construction. Such a result would be contrary to . . . our policies.

168. Section 73.3534(b) states that extension of a broadcast station construction permit may be granted if "[n]o progress has been made for reasons clearly beyond the control of the permittee . . . but the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction." To satisfy the requirements of Section 73.3534(b), "a permittee must demonstrate a specific incapacity and show consequences to the station's construction plan which persist despite the permittee's best efforts to proceed under the circumstances." *Carolyn S. Hagedorn*, 11 FCC Rcd 1695, 1697 (1996) (extension of time within which to construct a new FM station denied).

169. The showing offered in RBC's fifth and sixth extension applications[15] and the other evidence adduced at the hearing[16] did not meet the stringent standard for an extension of time set forth in §73.3534(b). To the contrary, a review of the pertinent findings under Issue 4 leads to the inevitable conclusion that a grant of RBC's extension applications "would disserve [the Commission's] public interest goals of furthering the ***prompt construction*** of broadcast facilities within a reasonable time frame and providing incentives for permittees to inaugurate new service as quickly as possible." *Golden Eagle*, 6 FCC Rcd at 5129 (emphasis added).

170. The findings show that RBC was awarded a construction permit to construct a

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[15] *I.e.*, construction has been delayed by a dispute with the tower owner.

[16] *I.e.*, Mr. Rey's hearing testimony and RBC Ex. 7.